

**Plumbers and Steamfitters Local Union No. 44, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Welded Construction Co.) and Jeff Holbrook and Mark S. Simons and Brian J. Davis.**  
Cases 19-CB-7136, 19-CB-7141, and 19-CB-7157

November 22, 1993

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On June 29, 1993, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief<sup>1</sup> and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions<sup>2</sup> and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Plumbers and Steamfitters Local Union No. 44, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> We adopt the judge's findings and conclusions that the Respondent failed to demonstrate that the bypassing of Local 598 welders for referral was necessary for the effective performance of its representative function. Even assuming that a potential loss of dispatching jurisdiction over the pipeline project is a matter for concern in the maintenance of legitimate representative functions, the Respondent failed to establish, for the reasons set forth by the judge, that the bypassing of the Local 598 welders was made necessary by the events of March 27, 1992, or was justified on any other basis.

*James C. Sand, Esq.*, for the General Counsel.  
*Steven Crumb, Esq. (Crumb & Casey)*, of Spokane, Washington, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on an unfair labor practice charge in Case 19-CB-7136, filed by Jeff Holbrook, an individual, on April 22, 1992, an unfair labor practice charge in Case 19-CB-7141, filed by Mark S. Simons, an individual, on April 27, 1992, and an unfair labor

practice charge in Case 19-CB-7157, filed by Brian J. Davis, an individual, on May 6, 1992,<sup>1</sup> the Acting Regional Director for Region 19 of the National Labor Relations Board (the Board), on June 3, 1992, issued an order consolidating the above-captioned matters and a consolidated complaint. Said consolidated complaint alleges that Plumbers and Steamfitters Local Union No. 44, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Respondent), engaged in acts and conduct violative of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices. The above-captioned matters came to trial before me in Spokane, Washington, on July 9 and 10, 1992, and, at the trial, all parties were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. Counsel for the General Counsel and counsel for Respondent filed posthearing briefs, and these have been carefully considered. Accordingly, based on the entire record herein, including the briefs and my observation of the testimonial demeanor of the various witnesses, I issue the following

## FINDINGS OF FACT

### I. JURISDICTION

Welded Construction Company (Welded) is a State of Ohio corporation and had an office and place of business in Pasco, Washington, at which location it engaged in the business of natural gas pipeline construction. During the 12-month period immediately preceding the issuance of the instant consolidated complaint, which period is representative, in the normal course and conduct of its above-described business operations, Welded purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of \$50,000 directly from sources located outside the State. Respondent admitted that, at all times material herein, Welded has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

Respondent admits that, at all times material herein, it has been a labor organization within the meaning of Section 2(5) of the Act.

### III. ISSUES

The consolidated complaint alleges that Welded was the subcontractor on a pipeline construction project in the States of Idaho and Washington; that the collective-bargaining agreement between the general contractor and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the UA), established an exclusive hiring hall for half the necessary manpower on the pipeline project; that construction of a portion of the pipeline was within the territorial jurisdictions of both Respondent and UA Local 598;

<sup>1</sup> Unless otherwise stated, all events herein occurred during 1992.

that the UA assigned jurisdiction and dispatching rights over the project in said areas to Respondent with the proviso that, after first dispatching its own qualified welders to the project, Respondent would then give preference in dispatching to qualified welders from Local 598 before turning to applicants from other UA local unions; that, pursuant to its instructions, Respondent solicited a list of qualified welders from Local 598; that, for the initial job calls for the pipeline project, Respondent adhered to the established procedure, first dispatching welders from its own list of qualified welders and then turning to the Local 598 list to fill an additional call for welders; and that, commencing on or about April 6, rather than continuing to follow the "established procedure," Respondent bypassed welders on the Local 598 list and began dispatching welders, who were members of other UA locals, to the Welded project. Based on the foregoing, the consolidated complaint alleges that Respondent engaged in conduct violative of Section 8(b)(1)(A) of the Act. Contrary to the General Counsel, Respondent denies that it engaged in any unfair labor practices, alleging that there was no established procedure for the dispatching of qualified welders to the Welded pipeline project and that, assuming a procedure existed, Local 598's failure to provide a list of qualified welders to Respondent for dispatch necessitated that Respondent dispatch from other sources in order to meet its contractual obligations.

#### IV. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Facts*

Respondent's office and hiring hall facility is located in Spokane, Washington, and its territorial jurisdiction covers northern Idaho and northeastern Washington. Scott B. Smith is Respondent's business manager, a full-time, salaried position, and his job duties include administering Respondent's hiring hall. William J. Krels is the president of Local 44 and acts in place of Smith when the business manager is away. On such occasions, Krels handles all of Respondent's administrative affairs, including dispatching procedures, and is paid for his work. Also, on the first Friday in March, Smith appointed Frank Reinhart as Respondent's pipeline business agent, with such being a full-time paid position.<sup>2</sup> UA Local 598, which has a larger membership than Respondent, has its office and hiring hall facility in Pasco, Washington, and its territorial jurisdiction covers south central Washington and four counties in Oregon. Gary Barcom is the business manager of Local 598.

With regard to the referral of members to jobs, the record establishes that Respondent and Local 598 have similar, if not identical, dispatching practices and procedures, which are posted in the hiring hall of each and are well known to the membership of each. Thus, both UA locals, composed predominantly of building trades crafts journeymen and apprentices, maintain out-of-work lists for plumbers, pipefitters, and welders,<sup>3</sup> and, for each craft, there are four out-of-work lists,

defined by hours of work within geographic areas. Members of other UA local unions are permitted to register on the out-of-work lists and be dispatched from the hiring halls of Respondent and Local 598 by depositing their travel cards in the locals, and members of either local retain their places on the out-of-work list of their home local while working within the territorial jurisdiction of other locals throughout the country but are not eligible for dispatch until their travel cards have been redeposited with their home UA local union. In addition, dispatching from the out-of-work lists is done in the order of registration on the lists, and both locals have similar rules such as the number of job turn-downs permissible without forfeiting one's position on an out-of-work list.

Sometime in 1991, Smith and Barcom became aware that the Bechtel Corporation was about to commence an 840-mile natural gas pipeline expansion project, from the Canadian border to central California, for PGT and PG&E and that portions of the work, subcontracted to Welded, would be performed in the States of Idaho and Washington and within the territorial jurisdictions of both Respondent and Local 598. The record reveals that no pipeline construction work had been performed within the territorial jurisdictions of either UA local for several years and that such work is considered highly desirable by welders inasmuch as "big inch pipe" is used and as there is normally a high rate of pay. Bechtel is a party to the National Pipeline Agreement between the UA and the Pipe Line Contractors Association, and a separate project agreement was also executed by the parties on January 6. Pursuant to the agreements, Bechtel and its subcontractors were authorized to hire half of the work force, comprised of welders, helpers, and journeymen, on their own and the UA was authorized to operate an exclusive hiring hall for referral of the remaining half of the required personnel to Bechtel and its subcontractors. The only proviso on the UA's referral rights was that it dispatch "only qualified" workers, those "who have had previous experience in the construction of transportation mainline pipe lines . . . ." Further, the collective-bargaining agreements authorized the UA to assign jurisdiction over the pipeline work to its local unions.

Pursuant to its authorization, George Lambert, the UA's pipeline section director, conducted a meeting on February 6 in Portland, Oregon, with the business managers of four West Coast UA local unions in whose territorial jurisdictions the pipeline would be constructed. Those business managers who attended included Smith and Barcom, and there is no dispute about what was discussed. According to Smith, Lambert "explain[ed] his concerns on these projects and express[ed] the paragraphs in the project agreement that would be adhered to." With regard to the qualifications of welders, who were referred to the pipeline project, Lambert "specifically wanted people with pipeline experience," however, it was understood that there would be no objection to the sending of individuals, known as "brons," who had no pipeline experience but who passed qualifying tests. According to Smith, "what [Lambert] really did not want was a pipeline job with a bunch of building trades hands on it that had no practical pipeline experience. And it was understood." Gary Barcom corroborated that Lambert emphasized

<sup>2</sup> Respondent admitted that Smith, Krels, and Reinhart are its agents within the meaning of Sec. 2(13) of the Act.

<sup>3</sup> In order to be classified as a welder, a plumber or pipefitter must pass a welding test and be certified as having done so. The individual will then be placed on the welders list; however, he may choose to be another list and not on the welding list. As will become evident herein, the welding skills necessary for building trades work are

apparently different and perhaps less stringent than those required for pipeline construction work.

the importance of dispatching qualified welders and threatened to take over the job if there was even “one wobble.”<sup>4</sup> With regard to the dispatching of qualified welders, according to Barcom, Lambert stressed the need for people with “previous pipeline experience” and said that “We don’t want a suitcase parade out there of people who really have no chance of passing the test.”<sup>5</sup> While Lambert said nothing as to whether Respondent or Local 598 would have jurisdiction over the Welded pipeline project work in Idaho and Washington,<sup>6</sup> pursuant to the national agreement, he was authorized to decide such matters and, by letter to Smith dated February 20, he wrote:

Due to the fact that the majority of the work awarded to Welded Construction Company is located in Local 44 jurisdiction, you have been assigned to police the jurisdiction of this project for the duration of the project agreement. However, since a portion of this project goes through Local 598 Pasco, Washington jurisdiction you are requested to use qualified Local 598 members on a first call basis when all Local 44 qualified people have been dispatched.

This assignment in no way changes historical jurisdiction boundaries. As stated above, this assignment is for the duration of this project agreement only.

With Respondent given jurisdiction over the Welded portion of the pipeline construction project, a “pre-job” conference was held in Spokane, Washington, on March 11 and 12. Present were Welded representatives, Lambert, Smith, Barcom, and Frank Reinhart, who, at approximately that time, had been appointed as Respondent’s business agent in charge of policing the pipeline project on its behalf. According to Smith, as Welded expressed concern, once again, there was “quite a detailed discussion” over how to qualify the welders, who would be dispatched to the jobsite. Smith said that Reinhart would be in charge of Respondent’s training, and as “I was curious about how [Local 598] was going to qualify welders to be able to meet this qualification on the pipeline . . . [Barcom] told me that he had a man . . . Phil Philip . . . that was going through the process and trying to qualify people to take a test.” Barcom testified that he told Smith that Local 598 had people “with previous experience and we were furnishing the opportunity for them to . . . refresh their skills.” He also assured Smith that his local would not take people with no pipeline skills and try to develop them.<sup>7</sup> Besides the foregoing, Smith and Barcom dis-

cussed how the dispatching of Local 598 welders by Respondent would be accomplished but only in terms of whether travel cards would be necessary. Thus, asked what was said by them regarding dispatching procedures, Smith testified that “we had discussed the travel card situation . . . because [it] . . . was not going to require any type of travel card provision . . . on this project. So . . . I had talked with Gary about it. . . . And at that time we decided that’s the way we were going to go, no travel card. A guy would have to be immediately available for work and be a qualified welder to take a call.” He explained, during cross-examination, that the only travel card requirement was that, to be eligible for dispatch by Respondent to the Welded job, a UA member welder, who was not a member of Respondent, had to have his travel card deposited with his own UA local. As to what was said regarding the dispatching procedures to be utilized for the pipeline project, Barcom corroborated Smith that such discussions were limited to the need for travel cards, stating that Smith “outlined the procedure to me . . . that he had been requested by the International to use our people after his people and he did not want them to deposit travel cards, that he would contact me for a list of available people when they started hiring.”<sup>8</sup>

On March 13, Respondent dispatched a welder, who was to act as its job steward on the pipeline project, and a helper to Welded, and Smith anticipated that Welded’s initial call for welders would follow shortly. Smith testified that Respondent had a short list of members, who possessed the qualifications to perform pipeline welding,<sup>9</sup> and that he had received “numerous” calls from throughout the country about the pipeline work.<sup>10</sup> He testified further that, as of

prejob conference, Barcom advised Smith that Respondent’s welders were welcome to train at Local 598’s yard. There is no dispute that several of Respondent’s welder-members trained there prior to being sent to Welded to test.

<sup>8</sup> Jeff Holbrook, a member of Local 598, who had prior pipeline welding experience and who, in early March, was working in the Seattle area, having deposited his travel card with UA Local 32, testified that he was informed by Phil Philip that a pipeline job would commence in April and that Local 44 would be doing the dispatching. Thereon, he telephoned Scott Smith, who told Holbrook about the pipeline project job. Holbrook asked what he had to do in order to get on the list for the job, and Smith told him to deposit his travel card with Local 598 in order to be dispatched. Holbrook said that that was not the normal procedure, and Smith said it was the way it was being done for this job. Two other members of Local 598, Mark Simons and Brian Davis, testified that they learned from Gary Barcom about the pipeline project and that he said that selection of welders for the project would come from a list of available welders, who possessed welding rigs on pickup trucks; and would be in the ordinary sequential manner from said list.

<sup>9</sup> Smith testified that he did not require that the welders, who requested placement on Respondent’s list for the Welded job, have prior main line pipeline experience and that Frank Reinhart, who was an experienced pipeline welder, administered an “advisory test” to each interested welder in order to demonstrate the rigors of the Welded welding test and to convince those welders, who were not capable of passing, not to place their names on the Welded list.

<sup>10</sup> Apparently, most of the calls were from members of UA Local 798, located in Tulsa, Oklahoma. The local is essentially comprised of pipeline workers, who travel great distances in order to perform pipeline work. At one point, Jeff Holbrook visited the Welded yard and observed numerous automobiles, bearing out-of-state license plates, which presumably belonged to Local 798 members.

<sup>4</sup> Lambert’s threat to rescind jurisdiction over the work from a local if there were any problems was taken seriously; for each business manager understood that, as the dispatching local retains the union dues of those dispatched, such would result in a potential revenue loss as well as a loss of opportunities to dispatch applicants from its hiring hall.

<sup>5</sup> Once an welding applicant was dispatched to the pipeline project, it was understood that Welded would test him to determine if, in fact, he was able to perform pipeline welding work. The type of welding utilized on pipeline projects is called “downhill” welding, and that is quite different than used in building construction work.

<sup>6</sup> Welded’s portion of the pipeline construction work would stretch 104 miles, with 30 miles of the pipeline to be within Local 598’s territorial jurisdiction.

<sup>7</sup> Apparently Local 598’s welding training facilities were larger and more elaborate than what Respondent had, and subsequent to the

March 17, he had not yet received, from Gary Barcom, a list of Local 598's qualified welders and that he did not want to have a "big call for people" without anyone to go from that local.<sup>11</sup> Accordingly, on that date, he sent a letter to Barcom in which he requested that Barcom send him a list of all "qualified" welders, journeymen, and helpers, who would be immediately available for dispatch to the pipeline expansion project. Three days later, on Friday, March 20, by "fax" transmission, Barcom sent a list of welders, entitled "Local 598 Applicants With Rig," to Respondent. Due to some sort of confusion in Respondent's office, Smith did not see the list and was not informed of its arrival, and, consequently, when Smith left for a week-long conference<sup>12</sup> in Scottsdale, Arizona, over the weekend, he was unaware that the requested list was in Respondent's office.

Barcom testified extensively with regard to the preparation of this March 20 list, General Counsel's Exhibit 9. Initially, during direct examination, Barcom testified that, as based on conversations with Smith, he believed that Respondent had more than adequate manpower to fill initial journeymen and helper job calls from Welded, he did not include individuals, who were available to fill those positions, on the list and that the listing of 25 individuals, which he reviewed, was "pre-screened" by Local 598's computer and contains "only those people who have downhill welding machines and trucks." During cross-examination, as to the listed individuals' qualifications, Barcom insisted that the fact that each possessed a welding rig indicated downhill welding and pipeline experience. Asked if he had any independent knowledge as to whether any of the 25 individuals had pipeline experience, Barcom replied, "only by their work history"<sup>13</sup> and "I have some personal knowledge." Further, regarding availability, conceding that, as of March 20, some of the listed individuals had not deposited their travel cards with Local 598 and, thus, were not eligible for immediate dispatch,<sup>14</sup> Barcom argued that most of those, who were traveling, were immediately available to him by telephone and that he believed there was no justification for insisting that travelers quit their jobs in order to stand by for the possibility of being called to take a welding test. Asked if he considered any other factor, other than ownership of a welding rig, availability, and work history, for inclusion on the March 20

list,<sup>15</sup> Barcom mentioned individuals, who could be termed "brons" and who were practicing "this particular welding procedure" at Local 598's welding facility. Finally, with regard to the listed individuals, Barcom conceded that Respondent could assume that each one was immediately available for dispatch and qualified to pass the Welded welding test, and there is no record evidence that Scott Smith had any knowledge of how Barcom had created the March 20 list or ever inquired as to such.

As stated above, during the week of March 23 through 27, Respondent's business manager, Smith, was in Arizona at a conference, and, as was the standard procedure, he delegated operation of the hiring hall to Respondent's president, Krels. Asked if he gave any instructions to Krels as to the dispatching of welders to Welded, Smith testified, "I told Bill Krels that Gary had promised a fax of a list of people who were readily available and qualified for that project; and if . . . the big call came for welders that would be a list he could refer to." Smith added that his intent was for Krels himself to telephone the Local 598 welders from the list. For his part, Krels, who did not take part in either the Portland or Spokane meetings, recalled that Smith "told me that we would be dispatching. We had a request form [sic] the UA that . . . after we sent qualified Local 44 pipeline welders . . . we would attempt to dispatch Local 598 pipeline welders off of the list they had supplied us."<sup>16</sup>

Welded's initial "big call" for welders came, by telephone, on March 25, and Krels dispatched five Local 44 welders (Wichterman, Hamilton, Veldez, Crothers, and Olsen),<sup>17</sup> who reported the next day (March 26) to Welded at its Pasco, Washington testing yard.<sup>18</sup> Krels testified that later, on March 26, Frank Reinhart, who was at the Welded testing yard in Pasco, telephoned him and said that Hamilton had "busted" (failed) the welding test and that Welded "needed more people" for testing. With no other welders available from Respondent's list,<sup>19</sup> as he had been instructed to do, Krels turned to the Local 598 list. The first two names on the March 20 list were William Willis and Roy Saltz; Krels telephoned both men and, after each accepted the job call, dispatched them to Welded to test the next day (March 27).

Krels further testified that, between 8 and 9 a.m. the next day, Reinhart telephoned him, "saying the two hands we had sent had not made the test and to get two more out there" and it was necessary to have welders "now" as Welded was about to commence a 4-mile section of pipeline near Coeur d'Alene, Idaho, on the following Monday and, as Welded

<sup>11</sup> According to Scott Smith, his understanding of Lambert's February 20 dispatching instructions was that "when we get through our Local 44 people, we were requested to use 598. It wasn't a mandatory deal."

<sup>12</sup> Gary Barcom also attended this conference.

<sup>13</sup> Asked if he reviewed the work history of each listed welder prior to placing him on the March 20 list, Barcom conceded that "I couldn't say I had personally reviewed every single one. . . . But most of them, we probably did." He added that he considered any pipeline work, even irrigation pipeline welding, as the required experience for the Welded project.

<sup>14</sup> The parties stipulated that the following individuals, who are named on Local 598's March 20 list, did not submit their travel cards to Local 598 until the listed date: Brian Davis (March 27), Ivan Newcomb (April 6), Mark Simons (March 27), Harold Roan (March 27), Glen Hart (March 31), Jeff Holbrook (April 3), M. Howard (March 30), and James Stull (March 27). The parties further stipulated that listed individual Jack Holbrook, the father of Jeff, was working out of and had his travel card deposited in Respondent's hiring hall on March 20.

<sup>15</sup> Barcom stated, during cross-examination, that welders were left off the March 20 list for one reason or another, but he gave no examples.

<sup>16</sup> Krels stated that Respondent had a list of its own members, who had previous pipeline experience or were qualified "through pipeline welding schooling." Also, according to Krels, by March 23, Respondent had Local 598's list.

<sup>17</sup> According to Scott Smith, three of the five (Hamilton, Veldez, and Olsen) had no previous pipeline experience, and Hamilton failed Welded's welding test notwithstanding having been approved by Reinhart.

<sup>18</sup> Respondent's business agent, Reinhart, was at the Welded yard in Pasco to take care of problems and was not involved in the actual dispatching. Local 598's hiring hall and office facility is also located in Pasco, no more than a half an hour from the Welded yard.

<sup>19</sup> One welder, Larry Ballinger, was traveling on another job.

wanted a full welding crew, the dispatching “absolutely had to be done.” By this time of the morning, dispatching is normally completed, and there is no dispute that Krels was faced with an emergency situation. First, he left a telephone message for Smith at the latter’s hotel in Scottsdale and, admittedly aware that he was obligated to continue to dispatch from the Local 598 list of welders, Krels then “started making telephone calls . . . .” Thus, after Roy Saltz, the next name on the Local 598 was that of Brian Davis. After being unable to reach him at home, Krels telephoned Local 598’s hiring hall and, on being told that Davis was practicing his welding in the yard, was transferred to Davis. According to Krels, “I asked Brian if he was ready to go to work, and he said no . . . . he was not ready to go yet.” At that point, Phil Philip, the Local 598 member who was assisting the Local 598 welders to prepare for the Welded pipeline welding test, broke into the conversation and said he didn’t think Davis should test. Then Davis came back on the line and asked if a refusal would “screw me up” for the job, and Krels admittedly said he didn’t think so.<sup>20</sup> Davis said “fine,” he could not take the test.<sup>21</sup> Krels stated that he then asked to speak to the next man on the list, Ken Rosenberger. Davis informed Rosenberger that Krels wanted to speak to him; the latter came onto the telephone line; and, after Krels offered a welding dispatch to Welded to him, Rosenberger said “that he wasn’t ready to go.” The next name on the list was that of Cecil Riley, who Krels was able to reach at his home in Idaho. Riley said he was too far from Pasco to be available for a dispatch and to take the welding test that afternoon but could be there the following morning (Saturday, March 28). Krels asked him to wait in order to permit him to contact others on the list because it was an emergency call for that day.

Krels testified that he again telephoned Local 598’s hiring hall in order to speak to Richard Stephens, the next man on the Local 598 welder list. “[S]omebody . . . answered the telephone and when I told them who I wanted to talk to, this person told me that Stephens was not ready to weld.” Soon thereafter, Stephens came on the telephone and said “[he]

had no interest in going.”<sup>22</sup> The next listed welder, whom Krels attempted to contact, was Waymon Lathrom.<sup>23</sup> According to Krels, Lathrom had been in Respondent’s hiring hall several times in the recent past and had left a pager number for reaching him. Also, Krels knew that Lathrom was in the process of driving from Spokane to Pasco, and, in those circumstances, telephoned Local 598, leaving a message for Lathrom to report to Welded’s yard, and telephoned the pager number with the same message. In any event, Krels was aware that Lathrom would not be available to test that afternoon, and, therefore, continued attempting to reach the welders on the Local 598 list in the order of their listing. While unable to recall anything with regard to Ivan Newcomb,<sup>24</sup> Krels did recall attempting to reach Mark Simons at Local 598’s hiring hall, but was informed by either Phil Philip or Daniel Timothy O’Leary, who is employed by Local 598’s joint apprenticeship training committee as the training coordinator and who is neither an agent or an officer of Local 598 and is not involved in dispatching for Local 598, that Simons “was not available.” Contrary to Krels, Mark Simons recalls speaking to a representative of Respondent after Willis and Saltz returned to Local 598 after failing the welding test for Welded. Stating that Brian Davis told him that Respondent’s representative wanted to speak to him, Simons said that he picked up the telephone, and the man “asked me if I could go down there that afternoon and take the test, and I said, no, I was having problems with my welding machine and I was on my way to get it repaired. . . . I said that I could not make it that day but I would be able to come out Monday first thing.” The Local 44 representative replied that he did not know when he would get back to him, and, according to Simons, said nothing contrary to Simons’ understanding that he could, without penalty, refuse a dispatch. The next welder on Local 598’s list was Harold Roan, who Krels reached at Local 598’s facility, and “he was not interested in going. His machine was not running properly. . . .” The next man on the list,<sup>25</sup> to whom Krels recalled speaking, on March 27 was Glen Hart. Reaching Hart at Local 598, Krels asked if he would report to the Welded project and take the welding test, and “I believe he said he would go if Phil Philip was going. . . .”

At this point, Krels appears to have been on the brink of panic, unable to fill Welded’s need for two qualified welders and with time running out. In desperation,<sup>26</sup> Krels telephoned

<sup>20</sup> While asserting that it was “not necessarily” true in this case, Krels admitted that, in the normal building trades context, an individual may refuse a dispatch call and retain his position on the out-of-work list. Asked if anyone communicated a change in this procedure for the Welded jobs, Krels said, no.

<sup>21</sup> Recalling that this conversation occurred in the early afternoon, Davis testified that it occurred after Willis and Saltz returned to the yard after failing the welding test, that a secretary informed him that someone from Respondent wished to speak to him and that he believed he was speaking to Frank Reinhart. The individual asked with whom was he speaking, and Davis identified himself. The individual said there was a Welded job call and asked if Davis wanted it. Davis corroborated Krels, saying he said, no, and added that his welding rig was not ready. Then, “I quizzed him about more jobs and more calls, and he assured me not to worry, that everyone . . . on their list would be called and given a chance to weld test in the very near future.” The Local 44 representative continued, saying that Davis should “not . . . worry; if you’re not ready to go out, don’t go out. We want men to go out that are going to make the test.” Davis testified that the failures of Willis and Saltz to pass Welded’s test was a factor in his thinking—“I was ready, but . . . its like the whole air of the thing that was happening . . . and they’re breaking guys out right and left.”

<sup>22</sup> There is no dispute that, in fact, Stephens did report to Welded’s testing yard that afternoon for a welding test and that he failed the test.

<sup>23</sup> The next name on the March 20 list, after that of Stephens, was Thomas Morse. Krels offered no testimony regarding efforts to reach him for a job dispatch; however, his name apparently was erroneously included on the March 20 list and was deleted from subsequent ones.

<sup>24</sup> The record establishes that Newcomb did not deposit his travel card with Local 598 until April 6, a fact unknown to Krels on March 27.

<sup>25</sup> Jack Holbrook, whose name appears after that of Roan, was working out of Respondent’s hiring hall as of March 27, and Krels had no information as to the next person, Wesley Burgess. The record establishes that Burgess was hired by Welded on March 30; however, there is no record evidence as to a dispatch for him.

<sup>26</sup> Krels knew that Welded needed two welders and would be prepared to test from Friday morning until Monday morning in order

*Continued*

Local 598 Apprentice Training Coordinator O'Leary and told him, "I don't care what you do. Get some people down there. We've got to have some people go test." O'Leary promised to find two people, and said, "Don't worry about it." Krels asked him to call back with the names so that he could properly refer the welders to the job. Shortly thereafter, O'Leary returned the call, stating that Hart and Philip would go and test for the jobs, and Krels made out the referral slips. Inasmuch as there had been two failures that morning, Krels telephoned Cecil Riley and asked him to drive to the Welded testing yard, and Krels also instructed Waymon Lathrom, who had telephoned Respondent's hiring hall, to report to Welded. Late in the afternoon, Frank Reinhart telephoned Krels and reported that Richard Stephens, who had earlier refused to take a dispatch, and Phil Philip had failed Welded's welding test and that, in view of Philip's failure, Glen Hart had refused to take it. Notwithstanding that he had Riley and Lathrom reporting for the test, after concluding with Reinhart, Krels placed another telephone call to Local 598 and spoke to O'Leary and Cal Martin, the assistant to Gary Barcom. Both men were "irate" over what had occurred that afternoon, and "I just told [them] that they really nailed me pretty hard that afternoon. . . . They pretty well unloaded on me and told me they thought this was a rotten deal. I couldn't disagree with them. . . . They told me that this was a set-up . . . and I tried to explain . . . we've been working too close together for too many years to start this kind of stuff. We're not going to do that." As to asking O'Leary for help that afternoon, Krels conceded that he had utilized the list as far as was practical and that, only when it clearly was beyond the normal dispatching hours, did he request that O'Leary<sup>27</sup> find him people to take the welding test.<sup>28</sup> According to Krels, on learning that both Lathrom and

to qualify them to begin work on Monday on the 4-mile Coeur d'Alene stretch of pipe. Krels knew the men would have certified and ready to go. Also, Krels understood that if he failed to refer qualified people to Welded, the company could easily hire Local 798 welders to do the work.

<sup>27</sup> With regard to the events of March 27, O'Leary, who was involved in the training of the welders for the pipeline job, had 10 welders practicing in Local 598's yard that day, and each had his equipment set up and working. At approximately 1:30 or 2 p.m., Krels telephoned Local 598 and spoke to O'Leary as "I think I was the only person available at the Union Hall." According to the latter, "Krels was pretty panicked . . . because he needed to get a couple of welders to the test lab immediately. Most of our people were practicing . . . at that time. He needed to get them out there as soon as they could get there. I went out to the yard to explain to our welders that they needed two welders to go test. The men were practicing and their equipment was strung out all over the yard. . . . Two people volunteered to go." Others "felt they needed additional time. A couple of the individuals wasn't sure of their equipment running properly. They were breaking them in and having a few problems. So basically there was just two people who thought they'd go help man the job." Later, after both men failed the test, Krels called again and was "really in a panic state" as he needed two more welders to test Saturday morning. O'Leary specifically denied anything being said about turning the pipeline dispatch procedure over to him for Local 598 members.

<sup>28</sup> The record establishes that Cecil Riley and Waymon reported to Welded on Saturday, March 29, and that each passed the required welding test. Further, while not dispatched, Wesley Burgess reported to Welded on Monday, March 30 and passed the welding test.

Riley had reported and passed the welding test, the dispatching crisis had eased.

The record establishes that Smith returned to Spokane over the March 28-29 weekend, and he testified that he discussed the Friday, March 27 dispatching problems with Krels on Sunday, with the latter informing him of the testing failures and the refusals of other Local 598 welders to report for testing.<sup>29</sup> Smith further testified that he also discussed the Friday events with Frank Reinhart. Asked if he perceived what occurred on Friday as a problem, Smith stated, "I didn't have a problem because they were going to pick the qualified people. We were not going to go by a list . . . being as they were going through and pick their people, make sure they were ready, I didn't have a problem with it." Smith stated that such was his understanding from his conversation with Krels, who had spoken to O'Leary, the Local 598 apprentice training coordinator. Neither Krels nor O'Leary corroborated the establishment of such a procedure. There is no record evidence that, during the week of March 30 through April 3, Smith ever had a conversation with Gary Barcom over the events of March 27, and, asked why he never communicated his dissatisfaction with the March 20 Local 598 welders list to Barcom, Smith testified, "I can't answer that . . . . I thought we'd already essentially taken care of that. . . . I made that assumption on the way they took charge of the situation."

The record establishes that there were no calls, from Welded, for welders from Monday, March 30 through Thursday, April 2<sup>30</sup> and that, on April 7, seven welders, necessary for a second welding crew on the pipeline project, reported to the Welded testing yard.<sup>31</sup> Scott Smith initially testified that Welded called for these welders on Monday, April 6, and that he first checked Respondent's list of welders and gave a dispatch to Larry Ballinger, who "had been working on another job" the previous week. Then, according to Smith, on the same day, following the procedure assertedly established the previous week, he placed a telephone call to Tim O'Leary of Local 598 and said he needed some welders and they had to be qualified to pass the Welded welders test. "And he said . . . 'I've got one welder who I'm pretty sure can make the test' . . . I asked him who it was. He said it was Harold Roan," and Smith prepared a dispatch to Welded

<sup>29</sup> According to Smith, Krels went through the list, detailing who failed the test and who refused to accept a dispatch. From his conversation with Krels, Smith testified, he formed the conclusion that Local 598's list of welders "wasn't really a list of what I formally requested and what I needed . . . which was a list of qualified, immediately available people . . . not people who had a fouled-up machine." Also, based on what Krels told him, Smith believed that, other than Willis and Saltz, all the other Local 598 welders, who reported to Welded on April 27, were told to do so by O'Leary. William Krels corroborated Smith that, over the weekend, they discussed the Local 598 dispatching problem the previous Friday and testified that he went down the Local 598 list of welders, explaining several refused dispatches and others had failed the test and stating his belief that it was a "phony" list as the guys were not ready to go out.

<sup>30</sup> There is no dispute that Welded did request the dispatching of helpers on or about March 30 and that Smith telephoned Gary Barcom and requested the names of two Local 598 members for the jobs. Subsequently, on being dispatched, two Local 598 helpers reported to Welded on March 31.

<sup>31</sup> Each passed the welding test.

for Roan.<sup>32</sup> Thereafter, according to Smith, also on April 6, requiring five additional welders, he turned to “a list of men who had called in starting back in early March to gain access to the job” and telephoned the listed welders until he located five (R. Ball, J. Ball, and Malnar of Local 798, Bowen, Lee), who accepted dispatches for the next day. Besides these five, the record reveals that two other welders (Varner and Gumpert), from UA locals other than Respondent and Local 598, reported to Welded on April 8. Believing that they also were dispatched “probably on the 6th,” Smith was not sure if either was a replacement or if any of the previous five welders failed to report or failed to pass Welded’s test. After giving the foregoing version of events, Smith was confronted with General Counsel’s Exhibit 18, copies of Respondent’s dispatch slips for the Welded pipeline project. These establish that welders Bowen, Ballinger, R. Ball, J. Ball, Lee, and Malnar, each of whom reported to Welded on April 7, were actually dispatched to the pipeline project on April 3 and that Harold Roan was dispatched after them on April 6. Asked to explain why the five welders, who were not members of either Respondent or Local 598, were dispatched before he bothered to seek anyone from Local 598, Smith averred, “I really want to be honest with you. I never looked at it that close. . . . Boy that’s confusing.”

On April 7, with Frank Reinhart and Respondent’s job steward on the Welded pipeline project, Smith traveled to Tulsa, Oklahoma, in order to attend a job steward’s school; from Tulsa, Smith traveled to Detroit and did not return to Spokane until April 20. As in March, William Krels acted as the hiring hall dispatcher during Smith’s absence. There is no dispute that, during this 2-week period, notwithstanding that four welders, one of whom was a member of Respondent, were dispatched to Welded on or about April 12 and 13, Krels failed to utilize any of the updated welder availability lists, which had provided to Respondent by Local 598, in order to fill three of the job requisitions.<sup>33</sup> As to whether he

was given any instructions with regard to dispatching Local 598 welders, Krels testified that he spoke to Smith just before he departed on April 7 and Smith told him that he (Smith) “had dispatched the last 598 pipeline welder they had” and that any further dispatches to Welded should be “from our other list of pipeline welders that we had.” Corroborating Krels, Smith admitted leaving the former with the understanding that Local 598 had no other qualified welders to dispatch and that Krels could dispatch from anywhere. Finally, Krels admitted that he never considered that Local 598 may have had qualified welders, who had previously been unavailable, as “I had been told 598 had no more available welders. It’s just that cut and dried.”

The record establishes that Jeff Holbrook, whose name was just beneath that of Glen Hart on the March 20 Local 598 welders list, did not deposit his travel card back with Local 598 until April 3.<sup>34</sup> Holbrook, who had previous pipeline experience, testified that Harold Roan returned to the Local 598 hiring hall after taking the Welded welding test on April 6 and reported that “there was people testing that were from [out-of-state].” Thereafter, Holbrook drove to the Welded testing yard and observed numerous vehicles with Texas and Florida license plates. Returning to the hiring hall, Holbrook confronted Gary Barcom with what he had learned, and Barcom said he would investigate. Subsequently, Barcom informed Holbrook that he had spoken to Frank Reinhart and that the latter agreed to appear at Local 598 in order to answer questions.<sup>35</sup> When Reinhart never appeared, Holbrook telephoned Respondent’s office on April 13 and spoke to William Krels, who asked if Holbrook was on the March 20 list. The latter said he was and accused Krels of bypassing him. After Holbrook said he was “on the list in Pasco,” Krels offered him a building trades job, but Holbrook refused, saying he wanted the pipeline job. Holbrook said he wanted to speak to Scott Smith; however, although Krels agreed to have Smith do so, later that day, Frank Reinhart telephoned Holbrook. According to the uncontroverted testimony of Holbrook, he asked why he was being bypassed on the list for the Welded job. Reinhart replied that he “had to man the job with welders that could pass the test and that there would have been too many Pasco people failed the test, and he was afraid of losing his jurisdiction and that George . . . Lambert told him to hire qualified people.” Holbrook asked who had been hired in place of Local 598 personnel, and Reinhart replied that he “hired people that I’ve worked with before that are 798 people.” Reinhart was not called as a witness by Respondent in order to controvert the testimony of Holbrook.

<sup>32</sup> Unable to recall whether it was on April 6 or 7, O’Leary testified that he was paged to the telephone “before noon” and spoke to an individual he believes was Bill Krels. The person failed to identify himself and “said that he needed one welder, do we have any qualified welders. I said, ‘Yes, I know we do. We have Harold Roan out in the yard right now. . . . I know he’s qualified.’ And basically he wanted to talk to Harold or have Harold contact him.” O’Leary asked if any more welders were needed, and the Local 44 representative said, “No, I need one welder.” To this, O’Leary said he had more welders to go. During cross-examination, O’Leary admitted not being concerned about Roan’s position on the out-of-work list; rather, he was giving his assessment of the most qualified person in the yard at the time and understood that Respondent had the list of welders. I asked why, on April 6, Smith did not use the list of welders rather than telephone O’Leary for a Local 598 welder, Smith stated, “As per the 27th and 28th weekend, we weren’t selecting the men. They were telephoning the men to go on the job. That’s how the welders . . . like Philip Philip, Glen Hart, Richard Stevenson, Cecil Riley, we didn’t contact those people, they were contacted by 598.” Later, asked the same question, Smith replied, “Because that list, we tried using that list, and it didn’t work out. . . . As a result of having so much trouble by going down this list and with people saying they weren’t ready, needed more practice, didn’t have a machine ready or whatever, 598 stepped in . . . they know their people better than we.”

<sup>33</sup> Notwithstanding that he was the individual responsible for operating Respondent’s hiring hall and for dispatching to the Welded project, Krels claimed he never saw any of the updated welder lists,

which Local 598 sent to Respondent’s office. The lists, G.C. Exhs. 10 through 15 were sent by facsimile machine to Respondent and are dated, respectively, March 23, 26, and 27 and April 6, 8, and 9.

<sup>34</sup> Accordingly, although this fact was unknown to Respondent at the time, Holbrook would have been ineligible for dispatch to the Welded pipeline project during the week of March 23 through 27; however, he clearly would have been eligible for dispatch on April 3.

<sup>35</sup> Barcom testified that he did, in fact, confront Reinhart at the Welded facility and that the latter agreed to meet with the Local 598 welders at the Local 598 hiring hall. However, Reinhart failed to appear for such a meeting.

Respondent's defense to the allegations, that it unlawfully refused to dispatch Local 598 welders on April 6, 12, and 13, involves its contractual obligation to Welded to dispatch only qualified welders and its assertion that, utilizing the March 20 Local 598 list of welders, rendered it unable to satisfy said contractual requirement. In support of its defense, Respondent offered into the record an April 24 letter to Local 598 from Scott Smith, in which he asserted that Respondent had "requested a pre-qualifying test" for welders<sup>36</sup> and demanded another Local 598 welder applicant referral list, which was to include verifiable past pipeline hours for each applicant. There is no dispute that, in response, on April 27, Local 598 sent a revised list of welders to Respondent and that, according to Gary Barcom, at least three of the listed individuals (Willis, Riley, and Philip) were not eligible for dispatch to Welded, having previously failed the welding test.

### B. Analysis

The General Counsel alleges that, having received welding job referral requests from Welded for its pipeline project on or about April 3, 6, 12, and 13, Respondent's failure to adhere to the established procedure for dispatching welders to the pipeline project and to dispatch Local 598 welders from the lists of available welders, which had been provided to Respondent by Local 598, was violative of Section 8(b)(1)(A) of the Act. Underlying the General Counsel's theory of the alleged violation of the Act is his contention that both Respondent and Local 598 had a "mutual understanding" of the meaning of George Lambert's February 20 letter—that Respondent would give "second priority" for job referrals to Local 598 welders, "that the procedure would be for Respondent to make the calls from a list provided by Local 598 and that applicants were to sign in with their home local." Contrary to the General Counsel, Respondent asserts that "there was [sic] no established hiring hall procedures which included the obligation to dispatch 598 applicants" and, alternatively, that, if hiring hall procedures existed, a departure from them was necessary for it to perform its representative function and meet its contractual obligations.

At the outset, Respondent admits that it operated an exclusive hiring hall for the dispatching of half of the required work force for Welded's portion of the construction work on the pipeline expansion project, and it is well established that "since a union has such comprehensive authority vested in it when it acts as the exclusive agent of users of a hiring hall and because the users must place such dependence on the union . . . there necessarily arises a fiduciary duty on the part of the union not to conduct itself in an arbitrary, invidious, or capricious manner when representing those who seek to be referred out for employment by it." *Boilermakers Local 374 (Construction Engineering)*, 284 NLRB 1382, 1383 (1987); *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985). In this regard, the Board has long held that, in operating an exclusive hiring hall, a labor orga-

nization must have objective standards for the referral of employees, and operating such a referral system without reference to such is violative of Section 8(b)(1)(A) of the Act. *Plumbers Local 513*, 264 NLRB 415, 420 (1982); *Pollis Wallcovering Co.*, 262 NLRB 1336, 1339 (1982); *Laborers Local 394*, 247 NLRB 97 fn. 2 (1980). Further, whether the rules or procedures for the operation of an exclusive hiring hall are established by collective-bargaining agreement or self-established, any departure from, or violation of, the rules or procedures which results in a denial of employment to an applicant, by the labor organization, which administers the exclusive referral system, inherently breaches the duty of fair representation owed to all hiring hall applicants and, likewise, is violative of Section 8(b)(1)(A) of the Act. *Cell-Crete Corp.*, 288 NLRB 262, 264 (1988); *Millwrights Local 2834 (Atlantic Maintenance)*, 268 NLRB 150, 156 (1983); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction Corp.)*, 262 NLRB 50, 51 fn. 6 (1982). In addition, "the failure to give timely notice of a significant change in referral procedures is a breach of a union's duty to represent job applicants fairly." *Cell-Crete Corp.*, supra.

Herein, in order to decide any questions of fact and to reach a determination as to the legal issues, it is necessary to resolve all credibility conflicts. I initially note that the only significant credibility conflict results from the respective testimony of Scott Smith and Daniel Timothy O'Leary regarding their conversation on April 6. As to this, I find that O'Leary appeared to be an honest and straight forward witness, testifying to his best recollection. In contrast, having observed his testimonial demeanor, which was that of an utterly mendacious witness,<sup>37</sup> and noting that his testimony, regarding his asserted April 6 dispatches to those individuals who reported to Welded on April 7, was utterly contradicted by Respondent's own dispatch records and that William Krels failed to corroborate him as to the establishment of a new dispatching procedure for Local 598 welders on March 27, except where corroborated by others and for what I deem to be admissions,<sup>38</sup> I can not rely on any aspect of the testimony of Scott Davis and, accordingly, credit O'Leary as to what was said during their April 6 conversation. In these circumstances, I find that, in filling Welded's April 3 request for seven welders to report for testing on April 7, Scott Smith, overreacting to the frenzied events of March 27 and fearful of losing the lucrative dispatching jurisdiction if more Local 598 welders failed Welded's welding test, deliberately ignored Local 598's list of welders and dispatched individuals, including three from UA Local 798, the UA's pipeline local, whom he was confident could pass Welded's test, and only turned to Local 598 when one additional welder was needed—even then bypassing the list and communicating directly with Tim O'Leary, who had assisted William Krels during the panic situation on March 27.<sup>39</sup> That Smith's intent

<sup>37</sup> I note his halting responses when asked by me why he did not telephone Gary Barcom on March 30 with regard to what occurred the previous Friday and when confronted with G.C. Exh. 18, the April 3 dispatch slips.

<sup>38</sup> I believe Smith was unusually candid in admitting that the reason he did not use Local 598's welding list for dispatching on April 6 because using it "didn't work out."

<sup>39</sup> I, of course, do not credit Smith that a new dispatch procedure involving Tim O'Leary had been arranged with Local 598 after

<sup>36</sup> There is no evidence to establish that such ever was a requirement for dispatch, and there is evidence that Respondent itself utilized a rather informal approach, with Frank Reinhart merely advising potential applicants as to their chances of passing the Welded welding test.



was to deliberately bypass Local 598's welders list in order to protect Respondent's dispatching jurisdiction for the pipeline project is evident from his fabrication to Krels that Local 598 had no more available, qualified welders, the result of which was that Krels did not utilize Local 598's list in filling Welded's job calls on April 12 and 13, and from the statement of Frank Reinhart to Jeff Holbrook, who was uncontroverted in this regard, that Smith had bypassed the Local 598 welders because "too many" had failed Welded's welding test and he was afraid Respondent would lose its dispatching jurisdiction.

Notwithstanding that, on its face, George Lambert's February 20 letter to Scott Smith appears to be a mere request that Respondent dispatch qualified Local 598 members to the Welded pipeline project after all of Respondent's qualified members have been dispatched, based on several factors, I am convinced that, given the language of the letter and the surrounding circumstances, it was meant as a directive; that Lambert's letter established a procedure for the dispatching of potential employees to Welded; and that both Local 598 and Respondent understood the letter as establishing a procedure to be utilized. Initially, in my view, the key to how imperatively one should interpret George Lambert's February 20 letter lies not with the word "request" but, rather, with the modifying phrase, "on a first call basis." Said phrase clearly implies exclusivity, and Lambert certainly would not have incorporated such language unless his intent was to direct<sup>40</sup> Scott Smith, after dispatching all of Respondent's qualified workers, to dispatch all of Local 598's qualified personnel before turning to other sources for referrals. That his words should be viewed more as a directive than as a mere request is clear from the surrounding circumstances. Thus, in his letter, Lambert's "request," which, in context, appears to be an effort to assuage Local 598, comes immediately after his specific recognition that a portion of the pipeline work would be within the territorial jurisdiction of that local, and not only was Local 598's business manager, Gary Barcom, invited to the Portland, Oregon meeting at which the participants discussed planning for the project and the need for qualified personnel but also he was invited to, and participated in, the prejob meeting in Spokane at which dispatching procedures, with regard to the need for travel cards, were discussed. Surely, that Barcom was invited to attend both conferences and that dispatching procedure was discussed constitute an acknowledgement that his local's members were going to be utilized in staffing the project's work force and negate any supposition that Respondent was under no constraint as to dispatching Local 598 members. Finally, immediately after the Spokane conference, Local 598 established a pipeline welding training program for its welder-members, about which Scott Smith was well aware. One may justifiably infer that such a program would not have been instituted unless Barcom understood that his local's members would be dispatched to the Welded job.

Further, while Respondent's counsel asserts that there existed no standards or procedures for the dispatch of welders to Welded, it is difficult to square this argument with the

facts.<sup>41</sup> At the outset, as counsel for the General Counsel points out, one may take Lambert's language, in his February 20 letter, as creating separate eligibility lists—one composed of Respondent's members, one composed of Local 598's members, and one composed of members of other UA locals—and an order of usage. Further, it is clear from the subsequent conduct of Barcom and Smith that each understood that Lambert's letter established a procedure for the dispatch of Local 598 members—with that local's qualified welders, who have signed the out-of-work list and have deposited their travel cards, forming a "B" list to be dispatched after the "A" list of Respondent's members. Thus, Barcom informed Mark Simons and Brian Davis that the selection of Local 598 welders would come from a list of available welders. Likewise, on March 17, Scott Smith requested that Barcom send him the lists of qualified Local 598 members, and, prior to departing for the Scottsdale, Arizona conference, Smith directed William Krels to dispatch Respondent's members to Welded first and then to dispatch Local 598 members from a list provided by that local. Such is precisely what Krels did on March 26 and 27, proceeding straight down Local 598's list and calling those listed in order in an effort to fill Welded's call for welders. Moreover, besides the required usage of the Local 598 lists for dispatching after Respondent's members, given William Krels' admission that he told Brian Davis that he (Krels) did not think that Davis' refusal of a referral to Welded on March 27 would "screw" him for the job and Mark Simons' similar uncontroverted testimony, I find that the Local 598 welder-members, who were on the Local 598 welder dispatch lists, could reasonably believe the normal building trades hiring hall rules, including the right to refuse referral without jeopardizing one's position on an out-of-work list, applied for the Welded job and that nothing done or said by Krels detracted from that belief. Based on the foregoing, I am convinced that not only did George Lambert's February 20 letter set forth a procedure for the dispatch of welders to the Welded pipeline project but also, in view of their conduct, the business managers of Respondent and Local 598, Scott Smith and Gary Barcom, understood the letter as doing so and acted accordingly. I am further convinced that, on March 26 and 27, an objective system, for the dispatching of welders to Welded, comprised of the February 20 Lambert letter, the communications of the business managers of Respondent and Local 598, and past practice,<sup>42</sup> was in effect; that such was known and understood by the hiring hall users, including those Local 598 welders, whose names were on the list of available welders, which had been sent to Respondent; and that Respondent's duty of fair representation, owed to all hiring hall users, was to abide by the procedure in dispatching welders to Welded.

Counsel for Respondent correctly notes that a labor organization's departure from its hiring hall rules is not violative of the Act if such is necessary in order to perform its rep-

March 27 and note that William Krels did not corroborate Smith as to this.

<sup>40</sup> I believe Lambert was merely being polite in using the word "request."

<sup>41</sup> Clearly, if no objective standards for dispatching existed, Respondent would have been free to dispatch to Welded in an arbitrary manner. Such clearly would have been violative of Sec. 8(b)(1)(A) of the Act (*Plumbers Local 513*, supra), and I find it difficult to believe that counsel for Respondent makes this argument seriously.

<sup>42</sup> The fact that Respondent's procedures and rules for dispatching to Welded were not codified does not detract from their validity as dispatching rules and procedures. *Laborers Local 394*, supra.

representative function and argues that such was necessary herein as Respondent was contractually obligated to dispatch qualified workers to Welded and as the only time it was unable to satisfy this requirement was when it attempted to dispatch personnel off of Local 598's March 20 list. Contrary to counsel, while I agree that there appears to have been a significant amount of pressure on Respondent to dispatch welders who would be able to pass Welded's pipeline welding test, I do not believe that Respondent has established that its departure from the hiring hall procedures was warranted herein. Initially, I note that, while it is true that four of the Local 598 welders (Willis, Saltz, Philip, and Stephens), who reported to Welded on March 27 failed the pipeline welding test, the referral order for that day was filled with Riley and Lathrom, both of whom passed the test, and Wesley Burgess, who was not dispatched, reported to Welded on March 30 and, likewise, passed the test. As with Respondent's welder-members, who were dispatched to Welded, the Local 598 welders, whose names were set forth on the March 20 list, were a mixture of men, some possessing pipeline welding experience and others having building trades welding experience. Moreover, all had welding rigs, which, to Gary Barcom, indicated sufficient welding experience. Furthermore, Scott Smith was aware that Local 598 was operating a training program, preparing its welders for pipeline welding work. Also, notwithstanding that several Local 598 welders gave various reasons to William Krels for refusing dispatches on March 27, the latter himself, reflecting past practice, stated such would have no effect on future referral prospects. In these circumstances, I agree with counsel for the General Counsel that the failures of March 27 manifested nothing to establish that others on the March 20 list were unqualified<sup>43</sup> or would assuredly fail Welded's test, and that, as of April 3, Scott Smith had no objective basis on which to disqualify all remaining Local 598 welders for dispatch to Welded. In my view, rather than fear of not meeting its contractual obligations, as evidenced by Frank Reinhart's revealing comment to Jeff Holbrook, Smith seems to have been more concerned with possibly losing Respondent's potential lucrative dispatching jurisdiction—hardly justification for failing to adhere to the established procedure for dispatching to Welded. Accordingly, by arbitrarily disregarding the guidelines, set forth in George Lambert's February 20 letter and understood by all parties for dispatching to the Welded pipeline project and, thereby, bypassing Local 598 welders for dispatch for the period April 3 through 13, Respondent breached its duty of fair representation owed to users of its hiring hall and, thereby, engaged in conduct violative of Section 8(b)(1)(A) of the Act. *Millwrights Local 2834*, supra.

<sup>43</sup> At the hearing, Respondent attacked the availability of several of the welders as of March 27. While I believe Respondent is correct that several welders would have been unavailable that day as they had not yet deposited their travel cards with Local 598, the fact is that, as he had no knowledge of such on April 3, Smith did not consider the foregoing in deciding to bypass the Local 598 list. Furthermore, as dispatching proceeded on March 27, several of the Local 598 welders, who had been training but had not yet deposited their travel cards with Local 598, deposited their cards and immediately became eligible for dispatch, and, by April 3, almost all cards at issue, except one, were on file with Local 598.

#### CONCLUSIONS OF LAW

1. Welded is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By acting in arbitrary disregard for the exclusive hiring hall procedure for the dispatch of applicants for the Welded pipeline project and, thereby, bypassing and failing and refusing to dispatch welders, set forth on Local 598's list of available welders, during the period April 3 through 13, Respondent engaged in conduct violative of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having determined that Respondent engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, I shall recommend that Respondent be ordered to cease and desist from engaging in such conduct and that it take certain affirmative action to effectuate the policies of the Act. The standard, and I believe appropriate, remedy in matters, such as herein involved, is to award backpay to those hiring hall applicants to whom Respondent breached its duty of fair representation by ignoring its hiring hall procedures and denying them dispatch. Accordingly, I shall further recommend that each of said individuals, the identification of whom shall be left to the compliance stage of the proceeding,<sup>44</sup> be made whole, by Respondent, for any loss of earnings and benefits which he may have suffered by reason of Respondent's unlawful refusal to refer him to the Welded job. Backpay shall be computed from the day each was scheduled to report to Welded until the conclusion of his work on the pipeline project in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as to be computed in the manner prescribed in *New Horizons*

<sup>44</sup> Counsel for the General Counsel requests that I specifically designate which applicants were deprived of dispatches and suggests the names of the individuals who should have been offered dispatches. While I deem his request to be reasonable, inasmuch as the choice of some may be questionable, analysis of Local 598's hiring hall records may be required, and these are not in the record. For example, with regard to the five disputed dispatches made on April 3, I believe that Scott Smith should have dispatched from Local 598's updated list of welders, dated March 27. On said list, after Willis and Saltz, both of whom were dispatched to Welded and failed its pipeline welding test, counsel suggests that the next dispatch should have gone to Brian Davis. After Davis, omitting Kenneth Rosenberger, the next listed individual, counsel suggests that the next dispatch should have gone to Mark Simons. While counsel cryptically notes that "Rosenberger had left," there is no record evidence that Davis would not have been available for a dispatch on April 3. Also, counsel would deny backpay to Brad Simmons, stating "he did not appear on the list until April 6, and no longer appeared on the list as of 4/9." Contrary to counsel, Simmons' name appears on the March 20, 23, and 26 lists, and, while his name is not on the March 27 list, it again appears on the April 6 list. As there were two disputed dispatches made on April 6 and he possibly should have been offered one, counsel's omission of Simmons as a suggested dispatch is puzzling. In these circumstances, and to avoid the possibility of error, I believe it is best left to the compliance stage to ascertain the names of those Local 598 welders, who should have been offered dispatches.

for the Retarded, 283 NLRB 1173 (1987). With regard to whether the listed Local 598 welders, who were not dispatched, are entitled to backpay, I have considered that each applicant, who was dispatched to Welded, was required to pass its pipeline welding test before being hired and that several Local 598 welders previously had failed the test. However, consistent with my above-stated view that there existed no justification for Scott Smith's conclusion that other Local 598 welders would fail the Welded test merely because previously dispatched Local 598 welders had failed and as to find merit in such supposition would reward a wrongdoer for its misconduct, I believe that the foregoing may not be a determining factor in the identification of applicants who should have been dispatched. In this regard, I note that the burden, in a compliance proceeding, will be on Respondent to prove that any would not have been able to pass the test, and, given that the pipeline job presumably has been completed, I find merit in counsel for the General Counsel's submission that is no objective way to duplicate the conditions, which existed in April 1992, and believe that any proof will be reduced to speculation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>45</sup>

#### ORDER

The Respondent, Plumbers and Steamfitters Local Union No. 44, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Arbitrarily disregarding the exclusive hiring hall procedures for the referral of applicants to the Welded pipeline project and, thereby, bypassing and failing and refusing to dispatch welders, who were set forth on lists provided by UA Local 598.

(b) In any like or related manner restraining or coercing employees, members, job applicants, or registrants in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make those Local 598 welders, who should have been dispatched by Respondent on or about April 3, 6, 12, and 13 had it acted in compliance with the exclusive hiring hall procedures for the dispatch of applicants to the Welded pipeline project, whole for any wages and benefits losses, sustained by them, by reason of Respondent's failure to adhere to the procedures, with interest, in the manner proscribed in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all hiring hall records, dispatch lists, referral cards, and other documents

<sup>45</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its business offices, hiring halls, and meeting places in Spokane, Washington, copies of the attached notice, marked "Appendix."<sup>46</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, members, and hiring hall applicants are customarily placed. Reasonable steps shall be taken by Respondent to ensure that notices are not altered, defaced, or covered by any other material. Additional copies of the attached notice shall be signed by an authorized representative of Respondent and forthwith returned to the Regional Director for posting by Local 598 if it so desires.

(d) Notify the Regional Director in writing within 20 days from the date of this Order of what steps the Respondent has taken to comply.

<sup>46</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice, reading "Posted by Order of the National Labor Relations Board" shall read "Posted by Order of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES AND MEMBERS

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT arbitrarily disregard the exclusive hiring hall procedures for the referral of applicants to the Welded pipeline project and, thereby, bypass and fail and refuse to dispatch welders, whose names were set forth on lists provided by UA Local 598.

WE WILL NOT in any like or related manner restrain or coerce employees, members, job applicants, or registrants in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make those UA Local 598 welders, who should have been dispatched by us, on or about April 3, 6, 12, and 13, 1992, had we complied with the exclusive hiring hall procedures for the dispatch of applicants to the Welded pipeline project, whole for any wages and benefits lost by them, with interest, by reason of our failure to adhere to the procedures.

PLUMBERS AND STEAMFITTERS LOCAL UNION  
NO. 44, UNITED ASSOCIATION OF JOURNEYMEN  
AND APPRENTICES OF THE PLUMBERS  
AND PIPE FITTING INDUSTRY OF THE UNITED  
STATES AND CANADA, AFL-CIO